clear from the appeal that the donor was making the gift to a particular purpose *only* even without any reservations and without expecting any return of the gift, upon a failure of the purpose as the donor's intention has been "cheated" he was entitled for the return of that portion of his donation which had not been exhausted on the purpose for which he had made the gift.

However in the present gift here where the settlor was not responding to any public appeal but was on her own making an out and out charitable gift for a particular purpose and where the settlor has not contemplated the eventuality of the failure of that gift for that particular purpose then the law will assume, particularly where the original gift had taken effect and effectively vested in charity, that the settlor in such cases would have desired and directed that the charitable gift was intended for the persons for whose benefit the original gift which had failed was meant and so the court will direct that the proceeds of the acquisition upon the failure of the original purpose should be applied cy-pres for other charitable purposes which would benefit the same group of beneficiaries. In such a case, there is no clear indication that the settlor had intended to benefit the beneficiaries in that one way only and in no other way. It may well have been that the settlor intended the gift for the benefit of beneficiaries and she wanted to benefit them in that particular way but if that way was not possible she would have desired to benefit them in some other like manner. It is reasonable to assume that this was so as she has parted completely with all her interests in the said lands and has left nothing for herself.

Mr. Goh took a further point that if it was found here that the settlor had made an out and out gift for a particular charity or charitable purpose then he submitted that the gift had only taken effect in respect of that part of the property which could be used as a burial ground only and not in respect of the rest of the land. In respect of that portion of the land which was unsuitable for use as a burial ground the gift had failed *ab initio* and a resulting trust in favour of the settlor's estate would arise in respect of that portion of the gift and so that portion of the proceeds of the acquisition should now be held on a resulting trust in favour of the estate of the settlor. Mr. Goh relied for his submission that part of the said property was not suitable for use as a burial ground on the basis of a survey conducted in 1970 by the surveyor, Tan Chin Huat. According to his affidavit relating to this survey filed in these proceedings in August 1975 he found that various parts of the property could not be used as a burial ground for one or other of the following reasons:—

(a) low lying swampy and muddy land liable to flooding,
(b) land covered with heavy secondary jungle with steep gradients,
(c) irregular land covered with ravines and drains and with steep gradients.

I am not convinced by this submission. Though part of the property in the state it was at the time of the survey was unsuitable for use as a burial ground there was nothing to show that whatever impediments there were could not have been overcome and those portions made suitable for use as a burial ground generally. Moreover the property in my view must be considered as a whole and should not be carved out into sections like this and then considered section by section to decide whether the land was suitable for use as a burial ground or not. The fact that these unsuitable portions scattered all over the area added up to almost half the whole land does not in my view alter the situation in any way. In addition *the Report of the Committee Regarding Burial and Burial Grounds* published in 1952 also showed that the whole land in question had been registered or licensed as a Burial Ground.

I find the whole of the said land the subject of the charitable gift here had effectively vested in charity and therefore the proceeds from the acquisition of the said land should now be applied to other charitable purposes according to a scheme cy-pres to be formulated by the trustees and approved by the court.

Now on the question of costs counsel for the plaintiff at the very outset of the hearing objected to separate representation here by the trustees and submitted that they should not be entitled to a separate set of costs. Counsel for the plaintiff also submitted that the costs of the first defendant in the event of her not succeeding should not come out of the trust funds.

I find that an application like the present one which mainly involved the construction of the Indenture creating the trusts would normally have been initiated by the trustees probably in Originating Summons No. 13 of 1969 and not in this suit. Then the proper order for costs would be that the costs of all the 3 parties be paid from the trust funds. Here however this application was made by the plaintiff but that in my view should not affect the order for costs. The trustees were served with all the documents relating to this hearing and they were properly before me. In the circumstances the costs of the 3 parties would be paid out from the proceeds from the acquisition of the said lands.

Order accordingly.

Solicitors: *Philip Hoalim & Co.; Allen & Gledhill; Mallal & Namazie.*

TAN AH CHYE v. CHIN KON SANG

[O.C.J. (Kulasekaram J.) May 26, 1976]
[Singapore — Suit No. 2329 of 1974]

Torts — Accident — Collision between motorcycle and motor-car — Plaintiff injured — Quantum — Assessment of damages — Liability on 2:3 basis.

Damages — Personal injury — Leg.

The plaintiff sued the defendant for damages for personal injuries suffered by him in a road traffic accident where his motor cycle ridden by him was involved in a collision with a motor car driven by the defendant. The plaintiff suffered the following injuries: (1) Closed fracture midshaft or right femur; (2) Avulsion of right posterior cruciate ligament with haemar-throsis of the knee-joint; (3) Fracture lower pole of right patella; (4) 2½ cm. laceration front of right knee. He had some loss of knee flexion which prevented him from squatting fully, and had an intramedullary nail introduced into the femur to fix the fracture which had to be removed by a further operation.

The plaintiff was treated as an inpatient at the hospital for about a month.

Held: (1) on the facts the plaintiff was two-thirds and the defendant one-third to blame for the accident;

(2) general damages for all the injuries was assessed at $8,000.

CIVIL SUIT.

Ng Kian Fong for the plaintiff.

Patrick Ong for the defendant.

Kulasekaram J.: In this action the plaintiff Tan Ah Chye sued the defendant Chin Kon Seng for damages for personal injuries suffered by him in a road traffic accident where his motor cycle SAC 6806 ridden by him was involved in a collision with a motor car SN 7195 driven by the defendant. The plaintiff alleged this accident was caused by the negligence of defendant in driving his motor car. The scene of the accident is in Jalan Lembah Kallang which is a short straight road running at right angles to two parallel roads, Bendemeer Road and Kallang Bahru and connecting these two roads.

According to the plaintiff on the morning of February 24, 1973 he was riding his motor cycle along Jalan Lembah Kallang in the direction of Kallang Bahru. He had entered Jalan Lembah Kallang from Bendemeer Road and as there was an almost continuous line of parked cars with gaps of about a car's length or two here and there for over 70 yards on his left hand side he had to keep to the centre of the road. The line of parked cars extended into the road to about 7½ feet from the left edge of the road. His speed along this stretch of road was then about 15 to 20 m.p.h. While thus proceeding he saw the defendant's car about 100 feet from him coming quite fast from the opposite direction along the centre of the road. He thought the defendant's car was then doing about 35 m.p.h. There were no cars parked on the defendant's left hand side of the road. As they got closer he realised he had not sufficient clearance to get past the line of parked cars on his left as the defendant was still keeping to the centre of the road. He remembered jamming his brakes then but almost immediately the collision took place and the defendant's car knocked into him. The front right hand corner of the car knocked into his motor cycle. He was injured in the collision and taken to hospital. This collision took place just opposite the entrance of Yuan Lee Engineering Works which was on his right hand side of the road. The last of the cars in the line of parked cars on the left was almost abreast his motor cycle when the collision occurred.

In cross-examination he maintained he was all along on his correct half of the road. According to him the defendant's car had encroached on to about one or two feet on his side of the road when the collision took place. He denied looking to his left and thereby not keeping a proper lookout. He said he took a glancing view to the left to see that he did not run into the parked cars there.

A police constable Sam Ah Khew from the Radio Division who arrived on the scene soon after the accident and who marked out the positions of the two vehicles on the road after the collision and before they were moved said that when he arrived at the scene he saw cars parked on the right hand side of the road as one looked towards Bendemeer Road near the scene of the accident.

The defendant's version is that on the morning in question he was driving his motor car SN 7195 and he entered Jalan Lembah Kallang from Kallang Bahru and was proceeding along Jalan Lembah Kallang in the direction of Bendemeer Road. He was travelling at a speed of about 25 m.p.h., keeping to his correct side of the road and about 3 or 4 feet from the left hand edge of the road. While so travelling he saw a motor cyclist, the plaintiff, coming from the opposite direction. When he first saw him he was in the centre of the road and about 50 feet from him. He noticed that the motor cyclist was looking to his left at some roof tops of some factories on his left. The motor cyclist was encroaching on his side of the road and therefore he sounded his horn and stopped his car. Despite this the motor cyclist collided into his car. The offside head lamp of his car was involved in this collision. His car was stationary when the collision took place and was about 3 or 4 feet from the left edge of the road. After the collision the motor cyclist was lying near the front offside of the car. According to him there was a 'no parking' sign on the right hand side of the road and there were no cars parked on his right hand side of the road near where he first saw the motor cyclist coming. When questioned in cross-examination as to why then the motor cyclist was travelling in the centre of the road when he first saw him he replied that the motor cyclist was looking at some roof tops on his left. According to him soon after he first saw the motor cyclist he (the motor cyclist) began to encroach on his side of the road. He said he was keeping a proper lookout but did not see any cars parked on his right hand side of the road near the scene of the accident.

Besides all this evidence there was an agreed bundle of documents containing the police reports made by the plaintiff and the defendant, the police sketch plan showing the scene of the accident with the positions of the 2 vehicles in question immediately after the accident and the key to this sketch plan, and 2 medical reports concerning the injuries that the plaintiff sustained as a result of this accident.

Having considered all the evidence in the case I accepted the plaintiff's version that there was this line of parked motor vehicles on his left along Jalan Lembah Kallang which occupied 7½ feet of the road from the left edge and that in order to pass that line of vehicles he had to keep to almost the centre of the road. Jalan Lembah Kallang was 21 feet 2 inches wide. I did not however accept his evidence that all along he was keeping to his proper half of the road and that the collision took place on his side of the road. I found the plaintiff at the time of the collision was encroaching about 2 feet on the defendant's half of the road and had been so encroaching as he was passing the line of parked vehicles on his left. I accepted that the speeds of the two vehicles were roughly those as stated by the respective drivers. I found that impact took place at about 2 feet from the centre of the road on the defendant's half of the road. I found both vehicles were in motion coming

to a stop when the impact took place. I did neither accept defendant's version that there were no cars parked on his right hand side of the road near the scene of the collision nor his version that the plaintiff was looking to his left at the roof tops of some factories just before the collision. I also did not accept that the defendant had sounded his horn. I found that both the plaintiff and the defendant had not kept proper lookouts and they were both to blame for this accident. As the plaintiff had to encroach on the wrong half of his road slightly to pass the line of parked cars on his left there was need for him in the circumstances to exercise an even better lookout than under normal circumstances and see that the road ahead was safe. If the plaintiff had done so he would have seen the defendant's car almost near the centre of the road ahead of him earlier than he did and he would have had sufficient time to warn the defendant of his approach. This would have enabled the defendant to move further to the defendant's left edge of the road and avoid this accident. I found that the defendant when he first saw the plaintiff was travelling in his car about 5 feet at least from his left edge of the road. The defendant too if he had kept a proper look would have seen the plaintiff earlier than what he did.

In the circumstances I found the plaintiff two-thirds and the defendant one-third to blame for this accident.

The plaintiff as a result of this accident sustained the following injuries: —

1. Closed fracture midshaft of right femur.
2. Avulsion of right posterior cruciate ligament with haemarthrosis of the knee-joint.
3. Fracture lower pole of right patella.
4. 2½ cm. laceration front of right knee.

He was treated for these injuries as an inpatient from February 24 to March 23, 1973 at the Outram Road General Hospital. Thereafter he was followed up as an outpatient. By June 7, 1973 the plaintiff was able to go back to light duties.

He has some loss of knee flexion which prevents him from squatting fully. He had an intramedullary nail introduced into the femur to fix the fracture and this will have to be removed by a further operation in due course.

Having considered the 2 medical reports at AB6 and AB7-8 and the opinions expressed therein which were not in dispute and which I accepted, and having regard to the awards made in comparable cases, I assessed the General Damages for all these injuries at $8,000. The Special Damages were agreed at $600.

In the result there was judgment for the plaintiff in the sum of a third of $8,600 with the usual consequential orders.

Order accordingly.

Solicitors: *Ng Kian Fong & Co.; Ong & Chellam.*

MALAYSIAN REPORTS

MAHMOD BIN KAILAN v. GOH SENG CHOON & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) August 20, 1976]
[Johore Bahru — Federal Court Civil Appeal No. 28 of 1976]

Tort — Negligence — Damages — Damages for loss of past earnings and loss of prospective earnings — When appellate court will interfere with assessment of damages.

Evidence — Letter from company stating that person is a labour contractor — Whether letter can be admitted without calling anyone from the company — Evidence Act, 1950, s. 73A.

The appellant appealed against the award of damages for loss of earnings, which had been awarded to him when he obtained judgment against the driver and owner of a taxi which had knocked him down. It was alleged that the learned trial judge had not given an award for past earnings. The learned trial judge awarded $12,000 for loss of earning capacity. The appellant had sought to prove that he was a labour contractor by producing a letter from a construction company, but no one from the company was called to give evidence.

Held, allowing the appeal: (1) the appellate court can only interfere with the award of damages by the trial court if it is shown that the trial judge has acted on a wrong principle of law or that he has misapprehended the facts or he has made a wholly erroneous estimate of the damage suffered;

(2) in this case the learned trial judge would have been justified in holding that the appellant but for the accident could have earned $200 a month as a labourer and therefore he should have awarded $14,800 for loss of past earnings for 74 months and $13,000 as general damages for loss of prospective earnings;

(3) the learned trial judge was correct in refusing to admit the letter from the company as not all reasonable efforts had been made to find the author of the letter.

Case referred to:-

(1) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, 616, 617.

FEDERAL COURT.

David Tay for the appellant.

V.P. Nathan for the respondents.

Suffian L.P.: The plaintiff, a motor cyclist, was injured when a taxi knocked him down and won judgment against the taxi driver and against the taxi owner.

He was awarded damages for three items as follows:

(1) $1,474 special damages;
(2) $35,000 for pain and suffering and for loss of amenities; and
(3) $12,000 for loss of earning capacity.

In this appeal, Mr. Tay argues on his behalf that the quantum should be more. He does not criticize items (1) and (2), but only item (3).

Loss of earnings is of two kinds:

(1) loss of past earnings; and
(2) loss of future earnings or loss of prospective earnings.

Mr. Tay says that what the learned trial judge has done is to make an award for loss of future earnings, but nothing at all for loss of past earnings. It is urged on us that the learned judge should have awarded —